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IN THE

Supreme Court of the United States

October Term, 1954.

No. 246.

PAUL W. DIEHL, JR.,
Petitioner,

v.

LEHIGH VALLEY RAILROAD COMPANY ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR LEHIGH VALLEY RAILROAD COMPANY, ONE OF THE RESPONDENTS.

Lehigh Valley Railroad Company, one of the Respondents, prays that the judgment of the United States Court of Appeals for the Third Circuit be affirmed. The Respondent is satisfied with the Petitioner's statement of the opinions below and the jurisdiction of this Court.

COUNTER-STATEMENT OF QUESTION PRESENTED.

Whether, under the Selective Training and Service Act of 1940, as amended, a veteran restored to the position he left to enter the armed forces, with accumulated seniority for the period of his absence, who subsequently completes the 1160 days of actual work fixed by the applicable collective bargaining agreement as the qualifying requirement for a different and better position, entirely separate and distinct from his former position insofar as seniority and seniority rights are concerned, is entitled to have his seniority ranking in the new position fixed on the basis of the date on which he actually completed the qualifying requirements as prescribed by the applicable agreement, or on the basis of the date on which he might have completed them had he not entered military service.

STATEMENT.

The Petitioner, a veteran, was duly restored on November 11, 1945, by his employer to the position which he had left to enter the armed services (Petitioner's Brief, p. 3). On January 10, 1949, he completed 1160 days of actual work required as qualification for promotion to another job of higher skill (R. 5a). He asks this Court to give him a better ranking in that new job.

The ranking in his employment which the Petitioner asks this Court to change is conferred by a labor agreement duly negotiated between Respondent Lehigh Valley Railroad Company and the Petitioner's collective bargaining agent, System Federation No. 96 of the Railway Employees' Department, American Federation of Labor; there is no question that the ranking results from a correct interpretation of that agreement. If this Court should intervene the agreement will be set aside.

The Petitioner was employed by the Respondent, before he entered the armed forces, as a carman helper, one of four subdivisions of the carmen craft established by the applicable collective bargaining agreement (R. 8a). He was carried on the seniority roster of carmen helpers (R. 10a) with seniority as of the date of his employment; no man could maintain his name on more than one roster (R. 9a).

On February 19, 1943, when he left for service, he had been assigned to perform the duties of a carman. Among the special rules for this craft was the required qualification that an apprenticeship be served or four years *practical experience* at carman work be obtained (R. 9a; emphasis supplied). The comprehensive nature of the required apprenticeship appears from various rules of the collective bargaining agreement (R. 45 et seq.).

When Petitioner was assigned to perform the duties of a carman he had had only eight months' experience. His brief (page 2) concedes that he was not qualified to become a carman. His name was placed on a desk seniority roster without affecting his seniority as a carman helper (R. 11a).

Although the Petitioner's brief (p. 2) seems to assert that the Petitioner, when he left for military service, could have claimed, in due course, promotion to carman, it is plain from the footnote on that page that he had no such right. Petitioner points to no agreement under which he had, or ever would have had a right to promotion at the time of his departure in 1943.

When the Petitioner returned from military service in 1945 his name continued on the roster of carmen helpers with seniority at the date of his original employment (R. 11a). Neither at his departure nor at his return was his name entered on any roster with the name of a qualified carman mechanic (R. 10a). At neither time had he seniority as a carman mechanic or any right to acquire any seniority as a carman mechanic (*Ibid*). He performed the work of

a carman mechanic and was entered upon the "desk seniority roster" only because of emergency and in pursuance of his temporary advancement. No agreement between Lehigh Valley Railroad Company and the Union conferred upon the Petitioner any seniority because his name was listed on the "desk seniority roster."

The status of temporary car inspectors (carmen) was dealt with by a memorandum of agreement dated March 1, 1949 (R. 11a), between Lehigh Valley Railroad Company and the Union. Under that agreement Petitioner and all other persons working temporarily as carmen on March 1, 1949—three and one-half years after Petitioner had been restored to the position with Lehigh Valley Railroad Company which he had left to enter the armed forces—were given the opportunity to elect whether to have their names placed on the roster of carmen, to take seniority on that list as of the date of completing 1160 days actual work—the definition by the parties of the four-year requirement for experience in the applicable labor agreement (R. 12a). Petitioner made this election and, when his name was first entered on the carmen's roster, took seniority as of January 10, 1949, behind the individual intervening defendants who had all completed their practical experience before that date.

The Petitioner's complaint, rejected by the courts below, is not that he did not receive when he returned from service the job which he had left but instead that he was aggrieved by the 1949 agreement negotiated more than three years after his re-employment. He urges in effect *that it be assumed* that had he not been in the armed forces he would *actually have been at work* a sufficient number of days to complete 1160 days of actual work, or practical experience, before the individuals now senior to him.

Argument.

I.

NO PROVISION OF LAW AFFORDS THIS VETERAN THE PERPETUAL PROTECTION WHICH HE SEEKS.

The Petitioner, in 1945, stepped back on the "escalator . . . at the precise point he would have occupied had he kept his position continuously during the war", *Fishgold v. Sullivan Corp.*, 328 U. S. 275, 284 (1946). Whatever advantages in wages, seniority, and the like, accrued to others while he was away accrued to him likewise, immediately upon re-employment, *nunc pro tunc*. He suffered no loss of seniority (R. 11a). There is no dispute about any of these matters.

But it is his position now that in every *subsequent* adjustment, if he succeeds in meeting requirements for a new job, he must again be treated, *nunc pro tunc*, as if he had not been away.*

Having remounted the "escalator" he asks now to be allowed to move about on it as further events take place and new conditions are met, always as if his interval of miiltary service had not existed.

No one could wish to cavil at fair treatment for returning veterans; legislation for their relief should be liberally construed: *Fishgold v. Sullivan Corporation, supra*, at page 285; but plainly, if a veteran is to have any right like that the Petitioner claims its source in the applicable statute must be readily pointed out.

Instead, the Petitioner points only to the provision that he must have a "like position", Sec. 8 (b) (B), denies that

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* Indeed, the Petitioner states this explicitly (Brief for Petitioner, p. 8).

he should be "considered as having been on furlough or leave of absence", Sec. 8 (c), and relies upon this Court's use of the phrase "continuously employed" to sustain his position.

A. The Petitioner Must Bring Himself Within One of the Specific Tests of Sec. 8 (c) if He Is to Escalate.

On the first point, the Petitioner's position in substance is that his claim to a *like* position under Sec. 8 (b) (B) is *greater* than his claim under any of the four definitions of content furnished by Congress in spelling out specific rights under Sec. 8 (c) (Brief for Petitioner, p. 12). This is precisely the reverse of what this Court has said. In *Fishgold v. Sullivan Corp., supra,* at page 284, this Court pointed out that the meaning of Sec. 8 (b) (A), (B) is to protect the veteran "against receiving a job *inferior* to that which he had before entering the armed services." (Emphasis supplied.) This helps the petitioner not at all for it only guarantees him his status on April 15, 1943. To this is *added* by Sec. 8 (c) the guarantee that he shall be "restored without loss of seniority" and shall be considered "as having been on furlough or leave of absence" during the period of his service for his country, with all of the insurance and other benefits accruing to employees on furlough or leave of absence; *ibid.*

As the opinion of this Court there points out it is Sec. 8 (c) which furnishes the escalator; what the Petitioner here is attempting to do when Sec. 8 (c) does not escalate him far enough is then to turn back to Sec. 8 (b) (B) in an attempt to get a further hoist. Such an attempt plainly fails.

B. This Court Has Spoken of "Continuous Employment" Only in Applying the Tests of Sec. 8 (c).

The second prop for the Petitioner's position is the assertion that in construing the Act this Court has created

a doctrine of "continuous employment" and established the proposition that a returned veteran must be treated for all time as if he had been "continuously employed" despite his military service. This is refuted by many expressions of this Court, of which the following is typical, *Aeronautical Lodge v. Campbell*, 337 U. S. 521, 526 (1949):

> "In other words, the Act gives him the status of one who has been 'on furlough or leave of absence' but uninterruptedly a member of the working force on whose behalf successive collective agreements are made. In this way the Act protects the furloughed employee from being prejudiced by any change in the terms of a collective agreement because he is 'on furlough', but he is not to be favored as a furloughed employee as against his fellows. This is the essence of our decision in *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U. S. 275."

Particularly in *Oakley v. Louisville & N. R. Co.*, 338 U. S. 278 (1949), upon which the petitioner relies strongly, is it clear (at page 284) that this Court was vindicating only "the veteran's right to the seniority to which he was entitled by virtue of the Act's treatment of him as though he had remained continuously in his civilian employment . . . He therefore assumes, upon his re-employment, the seniority he would have had if he had remained in his civilian employment."

Every expression of this Court concerning continuity of employment is voiced only in conjunction with a specific test specified in Sec. 8(c): when he is re-employed he must be given the benefit of any improvement through seniority which he missed while away and he must be regarded as having been a member of the working force on furlough; but no expression of this Court breathes independent life into the provisions of Sec. 8(b)(B). The guarantee of that section remains a guarantee of the position which he *left*.

His additional rights, if any, must accrue from Sec. 8(c)—any advantage he would have received if "on furlough or leave of absence"; any right which was a fruit of seniority while he was absent; any other benefit which he would have had on furlough; and not to be discharged "without cause" within one year after his re-employment. These four rights define the escalator and the first three define the bases on which the status of the veteran can be "better" than when he left. They are, of course, cumulative with each other as this Court decided in *Oakley;* but they exhaust the content of any improvement in status which a veteran can claim.

But it is plain in this case that the veteran when restored in 1945 was advanced to precisely the point of seniority where he would have been had he not been away. What he now asks is that at a time three years later, in a new job, he be given through operation of the Act a seniority status higher than that conferred by the very labor agreement which gave him any right at all to the new job. For this there is no warrant.

There is nothing in the facts in *Oakley* which assists the petitioner in his attempt to apply a doctrine guaranteeing him the benefits of "continuous employment". In that case Oakley, while he was in the armed services, missed the opportunity to transfer to another job, and Haynes, whose case was heard at the same time, missed a promotion. These benefits this Court plainly regarded as attributes of *seniority* accruing during absence which the veteran could not lose because of Sec. 8 (c) of the Act.

This Petitioner cannot show, as the District Court found that he cannot (R. 36a), that the status he seeks in a new job was a fruit of the seniority which accrued to his former position after he left, or that when he returned in 1945 he lost any seniority accrued during his absence. When he left he had no right or expectation of promotion to the position of carman; none accrued while he was away. This is the difference between his case and those of Oakley

and Haynes who, when they returned, could claim privileges of transfer or promotion solely by virtue of seniority in being part of a working force. So, too, does it differ from cases in the various Courts of Appeals where veterans have been held entitled to missed opportunities accruing in their absence because *seniority* guaranteed by Sec. 8 (c) brought those privileges within their grasp. In *Morris v. Chesapeake & Ohio Railroad Co.*, 171 F. 2d 579 (C. A. 7th 1948) a veteran missed an examination which his seniority would have entitled him to take; he was held to be protected by Sec. 8 (c). In *Conner v. Pennsylvania Railroad Co.*, 177 F. 2d 854 (App. D. C. 1949) and in *Spearmon v. Thompson*, 167 F. 2d 626 (C. A. 8th 1948) relief was properly granted in cases where the opportunity missed by veterans was found to be a perquisite of seniority accruing during their absence.

But that is not the case of the petitioner here. The seniority *in a new position* which he asks is plainly different from the seniority in his old position of which the Act assured him. He can have it only if it be assumed that had his absence in the armed services not occurred he would have completed the necessary qualifying time to assure him the senior rank in that new position. No such assumption is justified by the Act. In protecting veterans Congress has not required the Courts to guess.

The Court below, since it could not sustain the plaintiff's case on seniority, properly held that it would then sustain the labor agreement defining his seniority in a new position since that agreement treated the plaintiff fairly with all other members of his class and no worse than had he been on "leave of absence". See *Aeronautical Lodge v. Campbell, supra.* In so deciding the matter and in refusing to speculate when the petitioner might have completed his 1160 days of actual work the Court below followed the reasoning of many decisions of other courts of

appeal, in the Fifth Circuit: *Lipscomb v. Tennessee Coal Iron & R. R. Co.*, 189 F. 2d 708 (1951); *Special Service Co. v. Delaney*, 172 F. 2d 16 (1949); in the Sixth Circuit: *Gregory v. Louisville & N. R. R.*, 191 F. 2d 856 (1951); *Brown v. Watt Car & Wheel Co.*, 182 F. 2d 570 (1950); *Trischler v. Universal Potteries, Inc.*, 171 F. 2d 707 (1948); *Raulins v. Memphis Union Station Co.*, 168 F. 2d 466 (1948); in the Seventh Circuit: *Fries v. Pennsylvania Railroad*, 195 F. 2d 445 (1952); *Hewitt v. System Federation No. 152*, 161 F. 2d 545 (1947); and in the Ninth Circuit: *Seattle Star, Inc. v. Randolph*, 168 F. 2d 274 (1948).

The Petitioner is not correct in suggesting that the Court below equates the Petitioner's position with that of persons on leave of absence; the Court offers him that protection only because it can find no other guarantee on which the Petitioner can rely.

C. The Provisions of the 1948 Act Only Restate This Court's Interpretation.

The Selective Service Act of 1948 (62 Stat. 604, 50 U. S. C. App. 459) restates the terms of the 1940 Act and adds a declaration that a returned veteran shall be "so restored" as to give him status as he would have enjoyed if he had continued "in such employment continuously." This was already the doctrine of this Court in defining seniority rights to be given a veteran upon his return and rights which he might have had if on leave of absence. Since the statutory language is unchanged, no change of interpretation by this Court seems required.

CONCLUSION.

The Petitioner, after military service, was restored to his position without loss of seniority. What he asks here is that this Court improve his status in a new job for which he qualified long after his return and to which he was promoted under the terms of a *bona fide* labor agreement which also defines his seniority status. He points to no seniority right accruing while he was away which has been denied him; he has been treated no worse than if on furlough or leave of absence. The requirements of the Selective Training and Service Act have been satisfied and the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX.

The pertinent provisions of Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 885, 50 U. S. C. App. 308, are as follows:

(a) Any person inducted into the land or naval forces under this act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3(b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. In addition, each such person who is inducted into the land or naval forces under this act for training and service shall be given a physical examination at the beginning of such training and service; and upon the completion of his period of training and service under section 3(b), each such person shall be given another physical examination and, upon the written request of the person concerned, shall be given a statement of medical record by the War Department; Provided, That such statement shall not contain any reference to mental or other conditions which in the judgment of the Secretary of War or the Secretary of Navy would prove injurious to the physical or mental health of the person to whom it pertains.

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer, and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing

after discharge for a period of not more than one year—

• • •

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

• • •

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

• • •

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits

suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: Provided, That no fees or court costs shall be taxed against the person so applying for such benefits.

The Selective Service Act of 1948 (renamed the Universal Military Training and Service Act in 1951) is identical to the above statute except for additions not material here. The subsection enacting the "continuous employment" standard is Section 9(c)(2), 62 Stat. 615, 50 U.S.C. App. 459(c)(2), and is as follows:

(2) It is hereby declared to be the sense of Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.